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No. 82-335

In the Supreme Court of the United States

OCTOBER TERM, 1982

PEOPLE FOR FREE SPEECH AT SAC AND ANNE ELSE, PETITIONERS

v.

UNITED STATES AIR FORCE, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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QUESTION PRESENTED

Whether an "open house" on a military base in which certain civilian organizations participate must also be open to organized advocacy groups expressing views on political issues related to the military.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-42) is reported at 675 F.2d 1010. The opinion of the district court (Pet. App. 43-61) is not reported.

JURISDICTION

The judgment of the court of appeals was entered on April 28, 1982. On July 20, 1982, Justice Blackmun extended the time for filing a petition for a writ of certiorari to August 27, 1982, and the petition was filed on August 26, 1982. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. The Offutt Air Force Base (OAFB) near Bellevue, Nebraska, is ordinarily closed to the public; civilians are admitted only with the permission of the base commander.

Once a year, however, OAFB conducts an "open house" during which members of the public are invited on the base. The open house features "aerial demonstrations, static displays of aircraft and military equipment, military bands and drill teams, and information and recruiting booths manned by the Air Force, Navy, Marine Corps and Coast Guard" (Pet. App. 2).

Certain nonmilitary organizations also had booths at the 1981 open house, out of which this litigation arose. Specifically, there were private refreshment concessions and first aid stations; "safety-oriented concerns * * * [such as] the Coast Guard[, which] handed out material on safe boating, and the Nebraska Highway Patrol[, which] distributed safe driving manuals" (Pet. App. 48); Bellevue community service organizations in which base personnel were active, such as "[t]he local chapter of Big Brothers/Big Sisters[, which] distributed material designed to inform the general public of their programs [and] to recruit volunteers" (*id.* at 49); and the Chamber of Commerce, which "distributed tourist-oriented pamphlets on OAFB's Strategic Air Command Museum, Historic Bellevue, and Fontenelle Forest" (*ibid.*). Three defense contractors whose products were used at OAFB were also present, but the district court found that "[t]he literature made available by the[m] * * * was quite narrowly confined to presenting facts and figures about aircraft and weapons systems that they were currently supplying to the Air Force * * *. [T]he defense contractors were not permitted to hand out material of any other kind. That is, they were not allowed to distribute literature promoting their consumer products or public relations material regarding their corporations" (*id.* at 48-49).

Shortly before the 1981 open house, petitioners wrote to the OAFB base commander and asked permission to participate. They explained that they wished " 'to speak to the propriety of nuclear proliferation, bilateral disarmament,

the conversion of the weapons of war to instruments of peace, and the very existence of OAFB in our community' " (Pet. App. 3). Petitioners proposed to address these subjects at the open house by means of "a slide show, clowns, theatre, leafleting, musical songs and peace literature" (*ibid.*). When the base commander denied petitioners permission to participate, petitioners brought suit in the United States District Court for the District of Nebraska. That court refused to order OAFB to permit petitioners to participate in the 1971 open house, and the court of appeals, noting the short time available for decision, affirmed. Justice Blackmun also denied relief (*ibid.*).

2. After the 1981 open house was completed, petitioners amended their complaint to seek a declaratory judgment and an injunction against the OAFB practice. After a trial, the district court ruled against petitioners. The court relied on *Greer* v. *Spock*, 424 U.S. 828 (1976), noting that in *Greer* this Court held that political campaigns could be barred from a military installation even if " 'a civilian lecture on drug abuse, a religious service by a visiting preacher at a base chapel, or a rock musical concert' " were permitted (Pet. App. 54, quoting 424 U.S. at 838 n.10). The court reasoned that "the basic premise behind [both] the speech regulation" upheld in *Greer* and the restriction OAFB imposed on petitioners "is identical, to wit, keeping official military activities on the base completely free of entanglement with partisan political or ideological controversies of any kind" (Pet. App. 55).

The district court also noted that the Air Force regulation governing functions such as the OAFB open house specified that the Air Force "MUST NOT directly or indirectly endorse or selectively benefit or favor or appear to endorse or selectively benefit or favor any * * * quasi-religious or ideological movement * * * [or] political organization

* * * or be associated with the solicitation of votes in a political election" (Department of the Air Force Reg. (AFR) 190-5, para. 3d. (Mar. 18, 1970) (emphasis in original)). The district court found that this regulation "has been objectively and evenhandedly administered. In this regard, [petitioners] were simply unable to show that any other political or ideological organization with views presumably more favorable to OAFB's military mission was allowed to participate in the open house event" (Pet. App. 57).

3. The court of appeals, sua sponte considering the case en banc, affirmed. It rejected petitioners' argument that at the open house the Air Force itself engaged in ideological communication of a sort that obligated it to permit petitioners also to participate (Pet. App. 13-15). The court of appeals explained that "[t]he governmental interest which is served by the open house, beyond any 'ideological message,' is that the government is showing its citizens, who pay for the military, how it is spending their money" (*id.* at 15). The court added (*id.* at 24): "To us there is a vast difference between allowing the military to 'speak' in an effort to foster base/community relations and allowing the military to throw the weight of its resources behind a non-military ideological movement. * * * [W]e agree with the district court that the rationale of *Greer* v. *Spock* regarding non-involvement of the military in partisan politics is also applicable to non-involvement of the military in civilian ideological movements."

The court of appeals also rejected the argument that OAFB was required to permit petitioners to participate in the open house because it allowed some other civilian organizations to appear. The court pointed out that "[m]any of the 'civilian' groups which were given booths were, in fact, base-sanctioned, private organizations composed mostly of base personnel and their dependents"

(Pet. App. 18). In connection with the defense contractors, the court explained (*id.* at 18-19, 25; emphasis in original):

> The defense contractors provided literature and information about aircraft and weapon systems *currently* being supplied to the Air Force. The display and operation of aircraft was quite obviously a major part of the open house program. That the Air Force allowed contractors to provide, in the words of the district court, "blandly informative displays," was also reasonably related to the open house program. * * * It is of considerable importance to us that the contractors were strictly limited to the display of and information on equipment being currently supplied to the Air Force.
>
> * * * * *
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> To characterize the defense contractors' displays as "ideological" is to ignore the fact that they were only showing the "current state" of the Air Force. The contractors were not at the open house to debate the current or future state of the military but rather to show the current state.

Three judges dissented. They argued principally that OAFB acted impermissibly in "permitting defense contractors to participate in and benefit from the open house — in both commercial and ideological capacities — while denying [petitioners] the same opportunity" (Pet. App. 29). The dissenters also asserted that petitioners should have been allowed to participate in the open house because their "proposed literature booth is clearly compatible with the other activities at OAFB during the open house" (*id.* at 34).

ARGUMENT

Although petitioners attempt to characterize OAFB as a "public forum," they do not claim, and under *Greer* v. *Spock*, *supra*, plainly cannot claim, that they are entitled to

speak on the grounds of OAFB even if no other speakers are permitted there. *Greer* established that a military base, unlike, perhaps, a public street or park, is not a place to which citizens are entitled to access for expressive activities. See 424 U.S. at 838. The dissent in *Greer* did not take issue with the proposition that a military base may be closed entirely to civilians (see *id.* at 858 (Brennan, J., dissenting)); instead, it emphasized the general openness of Fort Dix, the base at issue there (see *id.* at 848-851). See also *Cafeteria Workers* v. *McElroy*, 367 U.S. 886, 893 (1961) ("the historically unquestioned power of a commanding officer summarily to exclude civilians from the area of his command"). Petitioners' central contention is rather that OAFB acts unlawfully in excluding them from the open house when other civilian organizations are allowed to participate and when the Air Force itself, according to petitioners, engages in speech at the open house. See, e.g., Pet. 7-9, 10, 12, 13.[1]

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[1]Petitioners also refer to certain events at the 1981 open house that give rise to contentions that are not properly before the Court. Specifically, petitioners cite incidents in which members of petitioner People for Free Speech at SAC were excluded from the open house because of messages they wore on their clothing or because they participated in a mass at the base chapel. Pet. 5-6, 7. The court of appeals stated that OAFB could not "constitutionally regulate 'clothing' speech of 'individual members of the general public, including members of [petitioners'] organization" unless the base commander reasonably believed the clothing created a substantial risk of disrupting base activities. Pet. App. 21-22 n.9, citing *Tinker* v. *Des Moines Independent Community School District*, 393 U.S. 503 (1969). But the court of appeals noted that petitioners' "amended complaint which was filed following the open house did not raise as an issue the restriction placed on 'clothing' messages, rather [petitioners] sought participation in the open house as a group" (Pet. App. 7 n.3). The court of appeals accordingly concluded that the district court did not have to consider whether to grant petitioners some form of relief for the clothing restrictions (*id.* at 22 n.9). Petitioners do not take issue with the court of appeals' conclusion that they did not properly raise their objection to the clothing restrictions below. Moreover, petitioners do not challenge the court of appeals' statement of the law that should apply to clothing restrictions in the

1. Petitioners' first argument is that because the Air Force "was speaking" and expressed a "pro-nuclear weaponry, pro-Air Force" message to the public at the open house (Pet. 7), petitioners should have been allowed to participate and express a contrary message. Even the dissenting judges in the court of appeals did not endorse this argument (see Pet. App. 34 n.5, 41), and in our view, it is insubstantial. As the court of appeals noted, it is a legitimate function, and a responsibility, of government agencies to explain and justify themselves to the public. See also *Barr* v. *Matteo*, 360 U.S. 564, 574-575 (1959). Government agencies routinely issue statements and engage in activities for this purpose, and petitioners appear to acknowledge that this was the purpose of the open house. See Pet. 6. The Air Force regulation governing events like the open house provides that "Air Force participation in public events * * * is authorized, encouraged, and essential, within the limits defined in this regulation, to * * * [i]nform the public on Air Force preparedness and * * * [d]evelop public understanding of the Air Force mission" (AFR 190-5, paras. 3a.(1) and (3) (Mar. 18, 1970)).

It is implausible to suggest that whenever the government uses a facility that it owns, to explain or justify its policies or activities to the public, it incurs an obligation to make that same facility available to persons who wish to express an opposing view. If this were true, "display cases in public hospitals, libraries, office buildings, military compounds, and other public facilities immediately would become Hyde

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future and do not seek any form of redress for the restrictions applied at the 1981 open house. We are advised that the OAFB did not attempt to exclude any persons from the 1982 open house because of messages on their clothing.

The court of appeals also ruled that the exclusion of the persons who attended the mass "is invalid based on the record before us" (Pet. App. 22 n.9). We have not sought review of that ruling.

Parks open to every would-be pamphleteer and politician" (*Lehman* v. *City of Shaker Heights*, 418 U.S. 298, 304 (1974) (plurality opinion)). For example, if Air Force officials held a press conference in a government auditorium at which they tried to portray the Air Force in a favorable light, petitioners surely could not claim a constitutional right to speak in the same auditorium to express contrary views. Their rebuttal would have to be offered elsewhere; in this case, for example, petitioners lawfully demonstrated immediately outside OAFB at the time of the open house (see Pet. App. 21 n.9).

2. As both courts below ruled, petitioners' contention that they could not be excluded from the open house because other civilian groups participated is inconsistent with *Greer* v. *Spock*, *supra*. "*Greer* * * * held that the Federal Government could prohibit partisan political speech on a military base even though civilian speakers had been allowed to lecture on other subjects." *Consolidated Edison Co.* v. *Public Service Commission*, 447 U.S. 530, 538 (1980). OAFB drew essentially the same distinction here. While petitioners do not propose to speak in support of certain candidates, the advocacy in which they wish to engage is unquestionably political and indeed addresses a subject of great concern to the military. If petitioners were allowed to participate in the open house, then groups advocating political views opposite to petitioners', such as increased defense spending and more reliance on military strength, would presumably also have to be allowed to be present and to attempt to win adherents and evoke displays of support on the base. The resulting dangers of military "entanglement" with political issues and of "the reality [or] the appearance of [the military's] acting as a handmaiden for partisan political causes" (424 U.S. at 839) are apparent. At the same time, the civilian groups allowed to participate in the open house — community service organizations,

safety organizations, and the Chamber of Commerce — are comparable to those civilians who were allowed to speak at Fort Dix. See 424 U.S. at 831 ("talks [on subjects] * * * rang[ing] from business management to drug abuse [,] [v]isiting clergymen * * * participat[ing] in religious services at the base chapel [;] [and t]heatrical exhibitions and musical productions").

We recognize that the participation of the defense contractors is more problematic than the participation of the other civilian groups. But the defense contractors did not engage in any activity remotely resembling overt political advocacy. Both courts below emphasized their understanding that the contractors were narrowly confined to providing facts and figures about the Air Force equipment already on display at OAFB and were not allowed to promote other weapons or products. Petitioners and the dissenting judges urge, in essence, that even this closely circumscribed activity was implicitly commercial, and that the implicitly commercial activity suggested an implicit political message. But many activities — academic lectures on economics or sociology, for example, or even the "business management" lectures approved in *Greer* — might be regarded by some as presupposing or implicitly endorsing a political position. If the military is to apply the distinction endorsed in *Greer*, so that it may forestall political entanglement without depriving servicemen of valuable contacts with civilian groups, it is unreasonable, and potentially more harmful to First Amendment values, to insist that the military also ferret out the implicit political advocacy in civilian activities not ordinarily thought to be political. This is especially true because it is overt political demonstrations — not hidden political messages apparent, for the most part, only to those who actively oppose them — that create the danger of causing

servicemen to take sides and of appearing to align the military with a particular point of view (see *Greer* v. *Spock*, *supra*, 424 U.S. at 846-847 (Powell, J., concurring)).[2]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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[2]We are also advised that no defense contractors appeared in the 1982 open house at OAFB.

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